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Bureau of Competition
FEDERAL TRADE COMMISSION
Public Reference Branch WASHINGTON, D.C. 20580

JUL 31 1984

May 22, 1984

Federal Trade Commission

William G. Kopit, Esquire
Epstein, Becker, Borsody
and Green, P.C.
1140 19th Street, N.W.
Washington, D.C. 20036

PUBLIC REFERENCE COPY
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Re: Request for Staff Advisory Opinion,
Kitsap Physicians Service

Dear Mr. Kopit:

This is in response to your letter of May 1, 1984, discussing further your request for a staff advisory opinion concerning a proposed policy by Kitsap Physicians Service ("KPS") to close its membership to "all [new] physicians in a specific category in which the physician to enrollee ratio is currently higher than certain specified generally acceptable standards." By letter of March 26, 1984, we explained that we were unable to provide you with a staff advisory opinion approving KPS's proposed policy, primarily because we could not conclude, based on the facts presented, that the policy would not have substantial anticompetitive effects or that there would be offsetting procompetitive effects.

We have reviewed the points you raise in your letter of May 1, and find that they do not lead us to a different conclusion concerning our ability to issue a staff advisory opinion concerning KPS's proposed policy. We do wish, however, to underscore certain points included in our earlier letter, which may help to explain our decision.

First, while we were unable to conclude in our March 26 letter that the policy proposed by KPS was lawful, we expressly noted that we were not concluding that the policy would violate the antitrust laws. Rather, we pointed out that such a policy, while clearly having the effect of excluding new physicians from KPS and, depending upon KPS's market power, possibly having the effect of discouraging or precluding new entry by physicians to the area, nevertheless must be analyzed for both its procompetitive and anticompetitive effects under the rule of reason. In your current letter you raise several points regarding the likely degree of KPS's market power, and hence any anticompetitive effects that might result from adoption of the proposed policy. However, your discussion of these points underscores the debatability of this issue, and serves to reinforce our belief that this is the type of determination that cannot appropriately be

made in the context of an advisory opinion, but rather requires a more comprehensive factual inquiry as part of a full-blown rule of reason analysis of the policy.

Similarly, we believe that an assessment of the market power, if any, of KPS -- a firm that your information shows has a 25% market share overall, and which we estimate covers approximately 33% of the privately insured population; a firm which a federal district court recently concluded to be the area's "dominant health care insurer" 1/ -- would require a more extensive factual inquiry than is feasible in the advisory opinion process. For example, your quoted reference from the Supreme Court's decision in the Hyde case 2/ specifically identifies "the need for further inquiry into actual competitive conditions" in determining whether or not a firm with a 30% market share in fact has market power (slip op. at 23).

I hope that this explanation helps to clarify for you the reasons that we were unable to provide you with a favorable staff advisory opinion concerning KPS's proposed policy.

In addition I would like to clarify an apparent misinterpretation of our letter of March 26. Your letter of May 1 states (at pp. 5-6) that our letter "acknowledges that an anticompetitive purpose [for instituting the proposed policy] does not exist." More precisely, our statement (p. 3) was that "independent evidence of a predominantly anticompetitive purpose [in adopting the proposed policy] is absent . . ." (emphasis added). However, we also concluded (p. 7) that the proposed policy does not appear to be "reasonably related to the achievement of . . . [the stated justification of] substantial cost-savings," and also appears to be "broader than necessary to promote legitimate cost-containment objectives of the plan." These internal characteristics of the proposed policy themselves could bring into question KPS's stated purposes in adopting such an exclusionary policy.

If I can be of further assistance to you, please let me know.

Sincerely,

Arthur N. Lerner
Arthur N. Lerner
Assistant Director

1/ Blue Cross v. Kitsap Physicians Service, 1982-1 Trade Cas. (CCH) ¶ 64,588 at 73,205 (W.D. Wash. 1981).

2/ Hyde v. Jefferson Parish Hospital District No. 2,
U.S. _____ (1984).